Yip Shou Shan v Majlis Peguam

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO 17–01 OF 1994
ABU MANSOR J
23 MARCH 1994

Legal Profession *— Application for sijil annual — Application rejected — Plaintiff was partner in previous firm in which no accountant's certificate had been issued for a certain year — Plaintiff issued with sijil annual on condition that he produced clean accountant's report of his previous firm — He failed to do so — Whether plaintiff should be issued with sijil annual — Whether to allow plaintiff's application would be to open floodgates, because he would be able to walk away from joint responsibility in management of previous firm*

Legal Profession *— Professional discipline — Whether disciplinary action under s 88A of the Legal Profession Act 1976 inappropriate as plaintiff was not in possession of practising certificate — Legal Profession Act 1976 s 88A*

The plaintiff was a partner in the firm of Yip Yeo and Nasrim but had left the firm on 1 October 1990. The accounts of the plaintiff's previous firm had not been resolved for the year 1990 and no accountant's certificate could be issued because of unfavourable comments made therein by accountants. It is also undisputed that the plaintiff had been issued with the sijil annual for 1992 and 1993 but they were issued on condition that the plaintiff deposited with the defendant, RM350,000, which reflected an amount which could not be reconciled in the plaintiff's previous firm. The plaintiff accepted those terms and paid the sum demanded and the sijil annual for 1992 was issued. This was followed by the sijil annual for 1993, but when the plaintiff applied for the issuance of the sijil annual for 1994, the Bar Council refused to issue the sijil annual for 1994 to him.

The plaintiff applied for the defendant to be directed to issue the sijil annual for 1994 to him; costs of the application; and other orders which the court deems fit and appropriate.

Held, dismissing the application:

(1) The plaintiff must satisfy the Bar Council that he had a clean accountant's report for 1990. The court found that the plaintiff had gone back on his word of producing to the Bar Council a clean accountant's report of his previous firm for 1990. To allow the plaintiff's application for a sijil annual now is to allow him to misuse the accommodation given to him by the Bar Council, who had clearly stipulated that in the event the plaintiff could not produce his 1990 clean accountant's report, he was to surrender his 1993 practising certificate. In the face of such a clear undertaking, the court would not assist him to commit that breach as if it was nothing of importance.

(2) Also, to allow the plaintiff's application for a sijil annual would be to encourage the opening of floodgates, because, should the plaintiff

be granted this application, he would be able to walk away from a joint responsibility in the management of his previous firm. A

(3) The taking of a disciplinary action under s 88A of the Legal Profession Act 1976 ('the Act') was inappropriate as the plaintiff was not in possession of a practising certificate and the proper step to be taken was a preventive one, and until he accepts his responsibility to furnish a clean accountant's report as required by the Act, he should be denied the sijil annual and a practising certificate. B

[**Bahasa Malaysia summary**

Plaintif merupakan seorang rakan kongsi firma Yip Yeo and Nasrim, tetapi beliau telah meninggalkan firma itu pada 1 Oktober 1990. Akaun firma lama plaintif itu belum lagi diselesaikan bagi tahun 1990 dan sijil akauntan tidak boleh diberikan kerana terdapat komen yang tidak baik oleh akauntan di dalamnya. Juga tidak dinafikan bahawa plaintif telah diberi sijil tahunan untuk 1992 dan 1993 tetapi mereka telah diberi atas syarat bahawa plaintif mendepositkan dengan defendan, RM350,000, yang merupakan jumlah yang tidak dapat dipersetujui di dalam firma lama plaintif. Plaintif telah menerima syarat itu dan telah membayar jumlah yang diminta dan sijil tahunan untuk 1992 telah dikeluarkan. Ini diikuti dengan sijil tahunan untuk tahun 1993, tetapi apabila plaintif memohon untuk sijil tahunan 1994, Majlis Peguam telah enggan mengeluarkan sijil tahunan untuk tahun 1994 itu kepadanya. C D E

Plaintif telah memohon supaya defendan diarahkan supaya mengeluarkan sijil tahunan bagi tahun 1994 kepadanya; untuk kos permohonan; dan lain-lain perintah yang difikirkan perlu dan sesuai oleh mahkamah. F

Diputuskan, menolak permohonan itu:

(1) Plaintif mesti memuaskan Majlis Peguam bahawa beliau mempunyai laporan akauntan yang bersih bagi tahun 1990. Mahkamah berpendapat bahawa plaintif telah memungkiri janji beliau untuk memberi Majlis Peguam suatu laporan akauntan yang bersih untuk firma lamanya bagi tahun 1990. Dengan membenarkan permohonan plaintif untuk sijil tahunan itu sekarang bermakna bahawa beliau dibenarkan menyalahgunakan peluang yang diberikan kepadanya oleh Majlis Peguam, yang dengan nyata telah mensyaratkan bahawa jika plaintif tidak memberi laporan akauntan yang bersih bagi tahun 1990, beliau perlu menyerahkan perakuan amalannya untuk tahun 1993. Memandangkan terdapat akujanji yang begitu jelas, mahkamah tidak akan membantu beliau untuk memungkirinya seperti ianya tidak penting. G H

(2) Lagipun, jika permohonan plaintif untuk sijil tahunan itu dibenarkan, ini mungkin akan merobohkan benteng, kerana jika permohonan plaintif dibenarkan, beliau akan dibenarkan mengelak I

daripada tanggungjawab bersama di dalam pengurusan firma lama plaintif itu.

(3) Tindakan tatatertib di bawah s 88A Akta Profesion Undang-Undang 1976 ('Akta itu') tidak wajar digunakan kerana plaintif tidak mempunyai perakuan amalan dan langkah yang patut diambil merupakan suatu langkah pencegahan, dan sehingga beliau menerima tanggungjawab beliau untuk memberi sijil akauntan yang bersih seperti yang diperuntukkan oleh Akta itu, beliau tidak sepatutnya diberi sijil tahunan dan perakuan amalan itu.]

[*Editorial Note*: The plaintiff has appealed to the Supreme Court vide Civil Appeal No 02–161–94.]

Legislation referred to
Legal Profession Act 1976 ss 29,32

G Sri Ram (*Benjamin Yean* with him) (*Liza Chan & Co*) for the plaintiff.
Sulaiman bin Abdullah (*Zain & Co*) for the defendant.

Abu Mansor J: Di dalam saman pemula, lampiran (3), bertarikh 22 Februari 1994, plaintif memohon perintah-perintah seperti berikut:

(a) defendan yang dinamakan di atas diarahkan oleh mahkamah yang mulia ini untuk mengisukan sijil tahunan bagi tahun 1994 kepada plaintif;
(b) defendan menanggung segala kos permohonan ini dan membayarnya kepada plaintif; dan
(c) lain-lain perintah yang difikirkan perlu dan sesuai oleh mahkamah yang mulia ini.

This chamber matter was adjourned to open court argument at my direction so that it may be fully argued. Mr Sri Ram appeared for the applicant, Mr Benjamin Yean with him and the defendant was represented by Tuan Hj Sulaiman Abdullah.

The undisputed facts of this case are as follows. On 1 October 1990 the plaintiff left the partnership of the firm of Yip Yeo and Nasrim ('the plaintiff's previous firm') and commenced his present practice of Messrs Peter Yip and Yong.

It is also not in dispute that for the year 1990 the accounts of the plaintiff's previous firm had not been resolved and no accountant's certificate could be issued because of unfavourable comments made therein by accountants.

Then, also undisputed is the fact that the plaintiff had been issued with the sijil annual in respect of years 1992 and 1993 but they were issued on condition that the plaintiff deposit with the defendant RM350,000 which reflected an amount which could not be reconciled in the plaintiff's previous firm. That sum was demanded vide letter at p 264 of encl (5A) which reads:

BC/Y/32, BC/Y/18 & BC/M/152
20 January 1992

1 Mr Peter Yip Shou Shan
Messrs Peter Yip & Yong
Advocates & Solicitors
Lot 5.04, 5th Floor
Menara MPPJ
Jalan Tengah
46200 Petaling Jaya
Selangor Darul Ehsan

2 Ms Margaret Yeo
Messrs Margaret Yeo & Nasrim
Advocates & Solicitors
25th Floor, Menara Tun Razak
Jalan Raja Laut
50350 Kuala Lumpur

3 Encik Mohd Nasrim bin Dato' Mohd Salleh
Messrs Margaret Yeo & Nasrim
Advocates & Solicitors
Lot 5.01, 5th Floor
Menara MPPJ
Jalan Tengah
46200 Petaling Jaya
Selangor Darul Ehsan

Dear Sir/Madam

Re: Sijil annual 1992

This is to inform you that the Bar Council has reviewed the position of the accountant's certificate in respect of the period 1 October 1991 to 31 December 1991 for the former firm of Yip Yeo & Nasrim.

The sijil annual will be issued to you subject to your acceptance of the following conditions:

1 That all partners will give appropriate joint and several undertakings to make good any shortfall in the clients' accounts for any losses that may have been occasioned to any client during the term of partnership.

2 That partners will deposit with the Bar Council the sum of RM341,095.30 before the issuance of the sijil annual which sum the Bar Council will place on fixed deposit. The fixed deposit receipt will be held by the Bar Council. In this respect your attention is drawn to the fact that in the event that only one of you applies for the sijil annual the partner applying will have to deposit the full amount of RM341,095.30 with the Bar Council. In the event two or more partners apply then each partner shall deposit the appropriate share of the said sum but subject to the condition that no sijil annual will be issued until the full amount of RM341,095.30 has been deposited with the Bar Council.

3 That you will be given a period of six (6) months in which to submit the audited accounts together with the accountant's certificate to the Bar Council. No extension will be permitted.

4 That in the event that you are not able to deliver the accountant's certificate to the Council within the stipulated six (6) month period expiring 20 July

A 1992, you are to surrender to the Council your practising certificate and immediately cease practice until such time as the Council is satisfied as to the state of your clients' account.

Kindly confirm your acceptance to the above terms and please comply with them should you wish the sijil annual to be issued.

B Yours faithfully
—sgd—
Zainur bin Zakaria
Chairman
Sijil annual committee

C The plaintiff accepted those terms and paid the sum demanded and the sijil annual for 1992 was issued. This was followed by the sijil annual for 1993 but when the plaintiff applied for the issuance of the sijil annual for 1994, the plaintiff received the following reply from the Bar Council in their letter of 21 February 1994:

D BC/Y/18 & y/32

21 February 1994 By Fax

1 Mr Peter Yip Shou Shan
Messrs Peter Yip & Yong
Advocates & Solicitors
E Lot 5.04, 5th Floor
Menara MPPJ
Jalan Tengah
46200 Petaling Jaya

2 Ms Margaret Yeo Eng Hong
F Messrs Margaret Yeo & Nasrim
Advocates & Solicitors
25th Floor, Menara Tun Razak
Jalan Raja Laut
50350 Kuala Lumpur

G Dear Sir/Madam

Sijil annual 1994

The Bar Council has considered your application for sijil annual for the year 1994 at its meeting held on 19 February 1994.

I regret to inform you that the Bar Council has decided that no sijil annual be
H issued to you for the year 1994 in view of the qualification in the accountant's certificate for the period 1 January 1990 to 30 September 1990.

Yours faithfully
Catherine Eu
Executive director
Bar Council

I Mr Sri Ram submitted that the plaintiff is unable to practice until a practising certificate is issued to him in accordance with s 29 of the Legal Profession Act 1976 ('the Act') which reads:

Advocate and solicitor to make declaration yearly.

(1) Every advocate and solicitor shall in each year he does any act in the capacity of an advocate and solicitor deliver or cause to be delivered to the Registrar:

(a) a declaration in writing stating —

(i) his full name;
(ii) the name under which he practises or the name of the advocates and solicitors or firm of advocates and solicitors employing him; and
(iii) the principal and any other address or addresses at which he practises in Malaysia;

(b) the last Sijil Annual or a true copy thereof, if any, issued to him by the Bar Council, and
(c) the prescribed fee,

and the Registrar shall on being satisfied that all the necessary documents are in order and that the firm's name under which the advocate and solicitor is practising is on the register maintained under section 85(1) issue to the advocate and solicitor a practising certificate.

Counsel said that before such a practising certificate can be so obtained, a sijil annual has to be issued by the Bar Council in accordance with s 32 of the Act:

Issue of Sijil Annual

(1) Subject to this section and sections 33 and 34, the Bar Council shall at any time after the month of June in the preceding year issue a Sijil Annual to an advocate and solicitor within twenty-one days of the receipt of an application under subsection (2) if —

(a) the Bar Council is satisfied that the application complies with that subsection and any rules made under this section;
(b) the Bar Council is satisfied that the applicant is not prohibited from holding a practising certificate under section 30;
(c) the advocate and solicitor has delivered or is exempted from delivering an accountant's report in accordance with section 79;
(d) the advocate and solicitor is not in arrears in respect of any contribution to the Compensation Fund, or of any subscription or levy lawfully due to the Bar Council or his State Bar Committee under this Act; and
(e) the advocate and solicitor intends to practise under an approved name.

(2) An application by an advocate and solicitor for a Sijil Annual shall be made in such form or forms as may be prescribed by and in accordance with rules made under this section and shall be accompanied by appropriate certificates showing that subsection (1)(d) has been complied with.
(3) Disciplinary proceedings may be taken against any advocate and solicitor if in, or in relation to, an application under this section he makes a false statement material to the application.
(4) Subject to this Act, the Bar Council may make rules regulating the issue of Sijil Annual.
(5) Any rules made by the Bar Council under this section shall be signed by the Chairman of the Bar Council.

A It is common ground the relevant accountant's report required for the 1994 practising certificate would relate the plaintiff's account two years prior to 1994. It was not disputed that the plaintiff would in this case have to produce to the Bar Council's satisfaction the accountant's report for the year 1992. It is also a fact that the sijil is issued to the advocate personally and not to the firm and it was also not in dispute that the plaintiff accountant's B report for 1992 was in order and beyond challenge.

The issue before the court, according to Mr Sri Ram, in his usual forceful self, is whether the decision of the Bar Council in the letter dated 21 February 1994 is correct? Can the Bar Council refuse to issue to the plaintiff the 1994 sijil annual, because of his qualifications in his account for C 1990? Mr Sri Ram contended that the Bar Council cannot do so. At some stage of his argument, he said the Bar Council is nothing more than a mere 'rubber stamp'.

Mr Sri Ram submitted that as the plaintiff had submitted to the Bar Council all that is required of him in accordance with s 32 of the Act and in a form provided for under s 32(4) of the Act, the issue of a sijil annual D under the Sijil Annual Rules is a mere formality. This is so since the plaintiff was able to produce a clear accountant's certificate for the required year 1992, which certificate was submitted by plaintiff on 18 November 1993. The Bar Council replied on 17 December 1993, calling for deposit to the Compensation Fund of RM100. The plaintiff duly paid vide receipt issued E 'PY–3'.

Mr Sri Ram further submitted that the case of the plaintiff is well known to the Bar Council after having presided over his case and the case of the partners of his previous firm. He submitted that the stand taken by the Bar Council is an unreasonable and untenable stand, when viewed on the background of his case.

F What is the remedy? One remedy open to the Bar Council, he submitted is to move the Chief Justice and have the plaintiff suspended, if he is found to be dishonest under s 88A of the Act. And the other remedy open to the Bar Council, according to counsel, is for the Bar to act against the plaintiff under s 93 of the Act to have activated the disciplinary proceedings against the plaintiff but at no time is the Bar Council entitled to use the provision G of the Act regarding sijil annual to punish an advocate like the plaintiff. The function of the Bar Council is more administrative in nature and, if any applicant could comply with s 32 of the Act, then the Bar Council must issue the sijil annual applied for. Since there are adequate provisions for disciplinary proceedings to be taken, the defendant cannot by a 'backdoor' H method and without a full enquiry as to how certain money is missing ex parte, sever the right of his client to practise, else the Bar Council is exercising a disciplinary function it no longer has.

Counsel submitted it is common ground that between 1990 to date, there was no complaint against the plaintiff in respect of misuse of client's money. The Bar Council has been unable to point this finger. Under the I circumstances, counsel on plaintiff's behalf moves this court for the order prayed for.

Tuan Hj Sulaiman valiantly defended the action of the Bar Council and, in reply, submitted that while plaintiff's counsel had summarized the facts

and the law faithfully, the court is not to lose sight of and must bear in mind one basic fact throughout the court's consideration of the plaintiff's case. This is to be kept, as it were, at the back of the court's mind.

This basic fact was that when the plaintiff applied for his sijil annual for 1992 and for his practising certificate for 1992, the plaintiff had to produce the accountant's report for his previous firm for the year 1990 and this he never could produce.

It is not disputed that there were very large correspondence brought about by the plaintiff's inability and that of his former partners to come up with the firm's accountant's certificate for the year 1990.

Counsel for the defendant submitted that the plaintiff's position seems to shift the blame to the other then partners of the plaintiff, Margaret Yeo and where the partners blame one another.

At the end of which the Bar Council was left in a position when the former partners indicated, if given time, the former partners could come up with the accountant's report showing a clean report.

In the defendant's affidavit, para 26 encl (5), the Bar Council warned the plaintiff vide their letter of 6 December 1991. Paragraph 27 sets out the plaintiff's reply dated 15 January 1992, the relevant period which brings the cut-off date being 31 January 1992. After 31 January 1992, any practising certificate issued would take effect from the date of issue but however, if the practising certificate is applied for before the end of January, then the practising certificate is deemed to have been issued from 1 January of the year applied for (see s 29(3)).

The court noted that it is beyond dispute that as late as 15 January 1992, the plaintiff's disagreement with former partners was far from resolved and a perusal of the plaintiff's letter dated 31 December 1991 to his previous partners Margaret Yeo and Nasrim at pp 278–284 of encl (5A), shows clear discrepancies of clients' accounts and accusation levelled at one another for the situation or the state of things. At p 284 of encl (5A), the plaintiff said: 'In the ultimate analysis, it is our duty to ensure that all clients' moneys are accounted for.'

The position of the Bar Council by 20 January 1992 was they issued the sijil annual subject to the conditions as stated at p 264 of encl (5A). The plaintiff was to produce the accountant's report by *20 July 1992*, if not the plaintiff were to surrender his practising certificate immediately.

Defendant's counsel submitted that, although learned counsel for the plaintiff submitted that the practising certificate for 1994 had to issue because the 1992 and 1993 ones were issued, it was very clear and beyond dispute that the 1993 practising certificate was issued on the condition that the plaintiff's clean 1990 accounts were going to be supplied. This was clear and that the Bar Council had never shifted from that position.

As regards the Bar Council's calling for the payment of compensation fee of RM100, counsel for the defendant explained that it was an error when the plaintiff's application was received together with others when the Council was receiving the thousands of applications for the sijil annual. The plaintiff was given a standard reply, I accept that explanation.

In para 73 of affidavit encl (5), it was clear that by 30 December 1993, the plaintiff's account position for 1990, as reported by accountant firm of

A Messrs Monteiro & Heng, was that the plaintiff's account in the previous firm showed a shortfall of RM700,000.

The court noted that the defendant's reaction was clear that the plaintiff could not produce a clean accountant's report for the year 1990. Unless that is done, then the plaintiff cannot be issued with a sijil annual. This stand was taken after a series of meetings with the plaintiff. I find merit in the defendant's counsel's argument that it remained the plaintiff's job to explain but the plaintiff is now asking the defendant to explain why he should not be issued with a sijil annual.

The position of the plaintiff is that, if I am correct, the Bar Council has nothing against him and it should not accept the Monteiro's report against his firm for the year 1990.

I find merit in the defendant's argument that it is certainly for the plaintiff to satisfy the Bar Council he had a clean accountant's report for 1990. I would go even further to say that the court cannot look at this matter in isolation as the plaintiff's application for the 1994 practising certificate. The court is entitled, in coming to a just decision, to look at this matter in its entirety. In doing so, the court finds that the plaintiff had certainly gone back on his word of having to produce to the Bar Council a clean accountant's report of his previous firm for 1990.

Clearly the Bar Council had very kindly accommodated him by issuing the sijil annual believing his tacit undertaking to have a clean accountant's report for 1990 produced. By allowing the plaintiff's application for a sijil annual now is certainly to allow him to misuse the accommodation given to him by the Bar Council, who had clearly stipulated that in the event the plaintiff could not produce his 1990 clean accountant's report, he was to surrender his 1993 practising certificate. In the face of such clear undertaking, this court will not assist him to commit that breach as if it was nothing of importance.

There is also another aspect of this matter that leans towards my refusing the plaintiff's application. To allow his application for a sijil annual is to encourage the opening of floodgates, in this type of cases, where if the plaintiff is granted this application, he will be able to walk away from the heavy responsibility of his partnership in the previous firm.

His responsibility and duty as a partner was clear to me and that is to see that the firm runs its affairs properly. He is not only behoven to look after his own affairs but is also enjoined to the higher responsibility of overseeing together that the firm is managed properly. No partner is allowed to throw the blame to another partner. If any lapse is committed by one, then the rest of the members must equally shoulder the blame.

In my reading of the letters at pp 279–284, the plaintiff shares the responsibility of the accountant's report not forthcoming. For example at p 282 in a letter written by the plaintiff to his partners, he said: 'I have also pointed out certain discrepancies of approximately RM32,000 in one of my client's (Haji Hassan) account which merit investigations.'

All in all, I say that to allow plaintiff this application is to allow him to go against his undertaking to produce his clean 1990 accountant's report and to allow him to walk away from a joint responsibility in the management of his previous firm.

I also find merit in the argument of defendant's counsel that the taking of a disciplinary action under s 88A of the Act is inappropriate as the plaintiff is not in possession of a practising certificate and the proper step to be taken is a preventive one until he can accept his responsibility to furnish a clean accountant's report as required by the Act, he should be denied the sijil annual and a practising certificate.

The question to be answered by the court is simply, would any advocate, applying for the sijil annual for 1992 in the same circumstances as the plaintiff, not being able to produce a clean accountant's report for the year 1990, have been granted by the Bar Council the sijil annual? The answer to the court is quite obvious — no. Why should the plaintiff be treated differently? The reason why he had been granted the sijil annual for 1992 and 1993 was because of his tacit undertaking to produce what was required and the Bar Council accommodated him.

For reasons given, this court dismissed the plaintiff's application with costs.

Application dismissed.

Reported by Jeanne Tan